RECORD
AND
BRIEFS

No. 16-969

In the
Supreme Court of the United States

SAS INSTITUTE INC.,

Petitioner,

v.

JOSEPH MATAL, Interim Director, U.S. Patent and Trademark Office, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association (IPO) is an international trade association representing companies and individuals in all industries and fields of technology that own or are interested in intellectual property rights.[1] IPO's membership includes roughly 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as an inventor, author, executive, law firm, or attorney member. Founded in 1972, IPO represents the interests of its members before Congress and the USPTO and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.[2]

SUMMARY OF THE ARGUMENT

In 2011, Congress enacted the America Invents Act (AIA) reforming patent review proceedings at the Patent and Trademark Office. The AIA created, among other things, *inter partes* review before the Patent Trial and Appeal Board (PTAB), which began in 2012. Congress intended *inter partes* review proceedings to be a true alternative to district court litigation for the determination of patent validity.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel of a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] IPO procedures require approval of positions in briefs buy a two-thirds majority of directors present and voting.

However, the PTAB's current practice of failing to address all challenged claims in the final written decision has frustrated this purpose.

The plain language of the AIA requires the PTAB to issue a final written decision that addresses every claim challenged in the petition. The PTAB's current practice does not conform to this requirement. Instead, when the PTAB institutes on only some of the challenged claims, its final written decision does not address the non-instituted claims, leaving them to be re-litigated. The Court of Appeals for the Federal Circuit has affirmed this practice in *SAS Institute Inc. v. Matal*, 825 F.3d 1341 (Fed. Cir. 2016) and *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309 (Fed. Cir. 2016). The Federal Circuit's decision undermines the legislative intent in enacting the *inter partes* review provisions of the AIA and, in particular, the estoppel provision intended to eliminate abusive litigation tactics. Instead, the PTAB should be required to conform to the statutory language and legislative intent of the AIA and address all challenged claims in a final written decision.

ARGUMENT

I. Section 318(a) Requires the Patent Trial and Appeal Board in an *Inter Partes* Review To Issue a Final Written Decision as to Every Challenged Claim

The plain language of the American Invents Act requires the PTAB to address in the final written decision all claims challenged by a petitioner.

Section 318(a) provides that, "[i]f an *inter partes* review is instituted and not dismissed," the PTAB "***shall*** issue a final written decision with respect to

the patentability of ***any*** patent claim challenged by the petitioner." 35 U.S.C. § 318(a) (emphasis added). Even where the PTAB institutes *inter partes* review on fewer than all of the claims included in a petition, those claims remain "challenged" by the petitioner. Given the clear and unambiguous statutory language, the PTAB's practice of failing to address challenged, but non-instituted claims in the final written decision, is *ultra vires*.

Although the Patent Office interprets section 318(a) differently, its interpretation is not entitled to deference because section 318(a) directly addresses the issue and plainly requires the final written decision to address all claims challenged by the petitioner. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter[.]"); *see also Util. Air Regulation Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

II. The Federal Circuit's Interpretation of Section 318(a) Does Not Have the Desired Effect That the Statute Envisioned

A. Congress Intended *Inter Partes* Review Proceedings To Be Effective Alternatives to Costly District Court Litigation

Congress intended for *inter partes* review proceedings to be faster, less costly alternatives for certain invalidity challenges—namely, invalidity under sections 102 or 103 based on patents and printed publications. *See, e.g., Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1330 (Fed.

Cir. 2016) (J. Newman dissenting) ("The design of the AIA is that the major documentary validity challenges, sections 102 and 103, will be subject to decision by the PTO expert tribunal."). *Inter partes* review was envisioned to "completely substitute for at least the patents-and-printed-publications portion of" infringement litigation. *See, e.g.*, 157 Cong. Rec. S1376 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl); S. Rep. No. 110-259, at 56 (Additional Views of Senator Specter Joined with Minority Views of Senators Kyl, Grassley, Coburn, and Brownback) (2008) ("[I]f second window proceedings [e.g., *inter partes* review] are to be permitted, they should generally serve as a complete substitution for at least some phase of the litigation."). Indeed, PTAB determinations were intended to be as final and definite as district court litigation.

Moreover, creating a complete substitute for district court litigation was intended to benefit both the petitioner and the patent owner. One of the main purposes of the AIA was to "provid[e] quick and cost effective alternatives to litigation" saving both parties time and expense to reach a conclusion of patent validity. H.R. Rep. No. 112-98, pt. 1, at 58 (2011). These quicker proceedings would replace prolonged litigation where the cost of defense itself would quickly exceed initial settlement value. Instead, "the Patent Office will make an administrative determination before the years of litigation as to whether this patent is a legitimate patent so as not to allow the kind of abuse we have seen," allowing defendants to evaluate the true efficacy of litigation before proceeding. 157 Cong. Rec. S5437 (statement of Sen. Schumer during Senate consideration of H.R. 1249).

On the other hand, the PTAB's determination was intended to protect the patent owner from defending the validity of its patent in multiple actions before multiple tribunals. A central purpose of the AIA is "to force a party to bring all of [its] claims in one forum . . . and therefore to eliminate the need to press any claims in other fora." 154 Cong. Rec. S9989 (daily ed. Sept. 27, 2008) (statement of Sen. Kyl). "Lengthy and duplicative proceedings" were considered to be "one of the worst evils of other systems of administrative review of patents." *Id.* *Inter partes* review was intended to eliminate these drawbacks of former review proceedings in favor of a dispositive and certain outcome. *See Synopsys*, 814 F.3d at 1327 (Newman, J., dissenting) (noting the legislative intent that "serial and duplicative attacks . . . not result from the new [PTAB] procedures").

The AIA's estoppel provisions, 35 U.S.C. § 315(e)(2), play an important role in preventing serial attacks on patent validity. By providing estoppel consequences, Congress intended "to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge," with the result of "significantly reduc[ing] the ability to use post-grant procedures for abusive serial challenges to patents." 157 Cong. Rec. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley). Unfortunately, the PTAB's current practice of failing to address all claims challenged in a petition for *inter partes* review not only frustrates the goal of preventing serial challenges to patent invalidity, but encourage that outcome.

B. The Statute's Estoppel Provisions Are Not Properly Applied When the PTAB Issues a Decision on Fewer Than All of the Challenged Claims

Under 35 U.S.C. § 315(e)(2), estoppel is applied on a claim-by-claim basis:

> The petitioner in an inter partes review of ***a claim in a patent*** under this chapter that results in a final written decision under section 318 (a), or the real party in interest or privy of the petitioner, may not assert either in a civil action arising in whole or in part under section 1338 of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that ***the claim*** is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review.

(emphasis added). For this reason, when the PTAB does not institute *inter partes* review on certain claims and the final written decision does not address them, courts have not applied the estoppel provision of section 315(e) to those claims. *See Princeton Dig. Image Corp. v. Konami Dig. Entm't Inc.*, No. 12-1461-LPS-CJB, 2017 WL 1196642, at *2 (D. Del. Mar. 30, 2017) ("[F]or estoppel to apply, under § 315(e)(2), the claim which a petitioner asserts is invalid in a civil action or ITC proceeding ('the claim') must be the same claim for which an IPR resulted in a final written decision ('a claim')."); *Depomed, Inc. v. Purdue Pharma L.P.*, No. 13-571 (MLC), 2016 WL 8677317, at *8 (D.N.J. Nov. 4, 2016) ("[I]f a claim of a patent is not instituted in an IPR,

and there is no final written decision as to that claim, the estoppel provisions of 35 U.S.C. § 315(e) do not apply.").

Removing any doubt as to how other district courts have correctly addressed the issue, the Federal Circuit itself recently noted: "***There is no IPR estoppel with respect to a claim as to which no final written decision results.***" *Credit Acceptance Corp. v. Westlake Servs.*, No. 2016-2001, 2017 WL 2485469, at *6 (Fed. Cir. Jun. 9, 2017) (emphasis added); *see also HP Inc. v. MPHJ Tech. Invs., LLC*, 817 F.3d 1339, 1347 (Fed. Cir. 2016) (noting that estoppel would not apply to grounds not instituted as redundant because "noninstituted grounds do not become part of the IPR"); *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1300 (Fed. Cir. 2016) (stating estoppel would not apply to an invalidity ground that was not instituted).

As a result of this practice, the validity of claims challenged in a petition but not included in the PTAB's final written decision remains subject to dispute—including challenges based on the same grounds already presented to and rejected by the PTAB at institution. As the Federal Circuit explained, "[t]he validity of claims for which the Board did not institute inter partes review can still be litigated in district court." *See Synopsys*, 814 F.3d at 1316 (rejecting patent owner's argument that "issuing final decisions only addressing some of the claims in the petition is inconsistent with the estoppel provisions of the AIA because final decisions that do not address all of the claims will have limited estoppel effect" (internal quotations omitted)). Essentially, petitioners get a second chance to

litigate the invalidity of certain claims because the PTAB failed to institute *inter partes* review on them. *See, e.g.*, *Princeton Dig. Image*, 2017 WL 1196642, at *2 (finding no estoppel and allowing invalidity challenge on claims not addressed in final written decision, including claims for which "no review . . . was ever instituted"); *Depomed*, 2016 WL 8677317, at *8.

In such circumstances, the patent owner experiences duplicative proceedings—proceedings before the PTAB (e.g., where the patent owner submits a preliminary response to the petition) and then again before a district court (or the International Trade Commission) on the non-instituted claims, potentially on the same or similar prior art addressed by the PTAB in its institution decision. Such a result increases the overall cost of the dispute and delays the ultimate resolution of the patent owner's claim. *See Synopsys*, 814 F.3d at 1332 (Newman, J., dissenting) (If the undecided claims are left for district court resolution, "the AIA purpose of replacing the cost and delay of district court validity proceedings instead dissolves into potentially duplicative proceedings in the PTO and the district court, enlarging rather than reducing cost and delay.").

For example, district courts often stay litigation pending the outcome of an *inter partes* review. *See* LegalMetric Nationwide Report, "Stay Pending Inter Partes Review in Patent Cases" (Aug. 2012-Mar. 2017) at 2 (noting win rate for contested motions to stay is 59.1%, in 680 decisions); Matthew R. Frontz, *Staying Litig. Pending Inter Partes Review and the Effects on Patent Litig.*, 24 Fed. Cir. B.J. 469, 485-86 (2015). Such a stay can impose a year or more of

delay.[3] When the PTAB does not institute on some claims, those claims necessarily survive the *inter partes* review proceeding. Thus, when the district court case resumes, the patent owner has suffered delay, yet has received no benefit from the stay because the petitioner remains free to challenge the validity of the claims that the final written decision does not address.

Under the decision below these proceedings become duplicative and are especially unfair and wasteful because the petitioner chose to take advantage of the *inter partes* review option and failed to convince the PTAB even to institute *inter partes* review, where the test is much lower than the test the petitioner would have to meet in district court or before the International Trade Commission. Specifically, before the PTAB, a petitioner must demonstrate a "reasonable likelihood" of prevailing on its assertion that at least one claim is unpatentable. 35 U.S.C. § 314(a). In contrast, in district court and before the International Trade Commission, the patent benefits from a presumption of validity and the party challenging validity must prove invalidity by clear and convincing evidence. 35

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[3] The PTAB will generally decide whether to institute *inter partes* review within six months after the petitioner files its petition. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48757 (Aug. 14, 2012). Once instituted, the PTAB should issue a final written decision within twelve months, which can be extended by six months for good cause. 35 U.S.C. § 316(a)(11). Although the duration of the stay will depend on when a litigant files and the district court acts on a motion to stay, and whether the stay remains in effect pending appeal of a final written decision, if the patent owner is successful in the *inter partes* review, the stay can last up to approximately eighteen months.

U.S.C. § 282(a) ("A patent shall be presumed valid . . . . The burden is establishing invalidity of a patent or any claim thereof shall rest on the part asserting invalidity."); *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359-60 (Fed. Cir. 1984); *see also Checkpoint Sys., Inc. v. Int'l Trade Comm'n*, 54 F.3d 756, 761 (Fed. Cir. 1995).

When the PTAB does not institute *inter partes* review for certain claims, it is usually because the petitioner has failed to show a reasonable likelihood that it would prevail in establishing that the claims are unpatentable. In making this determination, the PTAB typically explains the deficiencies in the petitioner's proof. *See, e.g., Unified Patents, Inc. v. Ruby Sands LLC*, IPR2016-00723, Paper 7, 2016 WL 5404386 (P.T.A.B Aug. 29, 2016) (describing reasons for not instituting for certain claims); *Amerigen Pharms. Ltd. v. Shire LLC*, IPR2015-02009, Paper 8 at 22-25, 29-34, 36-37 (P.T.A.B. Apr. 18, 2016); *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-01149, Paper 8 at 7-8, 2015 WL 5578351, at *7-9 (P.T.A.B. Jan. 28, 2015); *TWR Auto. US LLC v. Magna Elecs. Inc.*, IPR2014-00256, Paper 16, 2014 WL 2965893, at *15-19, 21-22 (P.T.A.B. June 26, 2014) (describing reasons for not instituting for certain claims).

Allowing the petitioner to have, in effect, a "do-over" in the district court or before the International Trade Commission with respect to such claims is manifestly unfair, especially after the petitioner failed to meet the lower standard for instituting *inter partes* review. As discussed above, Congress did not intend this result, but rather expected the estoppel to apply in a way that prevents duplicative proceedings and delay. *See* S. Rep. No. 110-259, at

67 (Additional Views of Senator Specter Joined with Minority Views of Senators Kyl, Grassley, Coburn, and Brownback) (2008) ("[I]f estoppel rules are unduly liberalized, second-window proceedings [e.g., *inter partes* review] could easily be used as a delaying tactic."); 157 Cong. Rec. S952 (daily ed. Feb. 28, 2011) (statement of Sen. Grassley) (The bill includes "a strengthened estoppel standard to prevent petitioners from raising in a subsequent challenge the same patent issues that were raised or reasonably could have been raised in a prior challenge. The bill would significantly reduce the ability to use post-grant procedures for abusive serial challenges to patents. These new procedures would also provide faster, less costly, alternatives to civil litigation" to challenge patents.); *see also supra* Section II.A.

C. To Effect the Purpose and Design of the AIA, the PTAB Should Address All Challenged Claims in the Final Written Decision

Congress intended *inter partes* review proceedings to be a true alternative for district court litigation for certain invalidity challenges. The current practice of not addressing all challenged claims not only frustrates this intent but allows duplicative challenges. This practice permits a challenger two bites at the apple, drives up cost for both parties, and encourages abusive litigation tactics. Instead, the PTAB should address all the challenged claims in the final written decision, thus triggering the estoppel provision for each challenged claim. This result is faithful to the statutory language and preserves the legislative intent and the

accompanying benefits of the *inter partes* review scheme.

Moreover, requiring the PTAB to comply with the statute would not be burdensome. Already when the PTAB does not institute certain claims for *inter partes* review, the PTAB explains the deficiencies in the petitioner's proof. *See, e.g.*, *Unified Patents*, 2016 WL 5404386; *Amerigen Pharms.*, IPR2015-02009, Paper 8 at 22-25, 29-34, 36-37; *Ericsson*, 2015 WL 5578351, at *7-9; *TWR Auto.*, 2014 WL 2965893, at *15-19, 21-22. The PTAB should incorporate that analysis into its final written decision. This approach would effectuate the purpose of *inter partes* review and eliminate abusive practices of pursuing duplicative challenges of invalidity.

CONCLUSION

For these reasons, the Court should hold that 35 U.S.C. § 318(a) requires the PTAB to issue a final written decision as to every claim that a petitioner challenges in its petition for which an *inter partes* review is instituted.

Respectfully submitted.

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1. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

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